Supreme Court, U.S.
FILED
001685 MAY - 7 2001
OFFICE OF THE CLERK

(1)

No.

IN THE

# Supreme Court of the United States

THE STATE OF OKLAHOMA, ex rel., Moshe Tal, and Taxpayers Against Ripoffs ("T.A.R."), an association of more than ten resident taxpayers of the City of Oklahoma City, Oklahoma,

Petitioners,

v.

THE CITY OF OKLAHOMA CITY, OKLAHOMA, et al.,

Respondents.

**On Petition For A Writ Of Certiorari To The Supreme Court of Oklahoma**

## PETITION FOR A WRIT OF CERTIORARI

MaryGaye LeBoeuf
6704 Parkwood Lane
Oklahoma City, Oklahoma 73132
Telephone: (405)728-9925

Counsel for Petitioners

30 pp

## QUESTION PRESENTED FOR REVIEW

Whether taxpayers' rights to due process are violated when the taxpayers' motion to intervene in a government action is denied on the grounds that the government is "adequately representing" the taxpayers' interests, and that holding of "adequate representation" is subsequently held to be res judicata so as to prevent the taxpayers from asserting a post-judgment challenge to the binding effect of the judgment against them, as authorized under *Hansberry v. Lee*, by showing that they were, in fact, inadequately represented.

## PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

Petitioners: **Moshe Tal, Ronald D. Benton, Lisa (Michelle) Bowers, Tracy (Joe) Ford** (a.k.a. "T.J."), **Robby (James) Lovett, W. D. McGowen, Dhybon McGowen, Dr. John Migliaccio, Steve Migliaccio, Physilla (Jo) Polley, Edna (Ennise) Richardson, Morning-Star Takapu, Kasey (Leigha) Toms**, and **Michael (Lawrence) Toms.**

Respondents: **The City of Oklahoma City** ("City"), Oklahoma, a municipal corporation; **Ronald J. Norick**, in his personal and official capacity as former Mayor of the City; **Kirk D. Humphreys**, in his personal and official capacity as the Mayor of the City; **James E. Thompson**, in his personal and official capacity as Assistant City Manager & former MAPS Director; **William O. West**, in his personal and official capacity as City's Municipal Counselor; **Daniel T. Brummitt** in his personal and official capacity as City's Assistant Municipal Counselor; **The Oklahoma City Urban Renewal Authority** ("Urban Renewal"), a public body corporate; **Tiana P. Douglas**, in her personal and official capacity as the Executive Director of Urban Renewal; **Stanton L. Young, Fred Jones Hall, J. Larry Nichols, Warren Gardner, and James R. Tolbert III**, in their personal and official capacities as Commissioners of the Urban Renewal; **William ("Bill") O. Johnstone** in his personal and official capacity as the former Commissioner of Urban Renewal; **Dan Batchelor**, in his personal and official capacity as legal counselor of Urban Renewal; **Bricktown Parking Investors, L.L.C.**, an Oklahoma Limited Liability Company; **Bricktown-TMK/Hogan Parking, L.L.C.**, an Oklahoma Limited Liability Company; **OKC Athletic Club Limited Partnership**, an Oklahoma Limited Partnership; **BAP-**

**Bricktown, L.L.C.**, an Oklahoma Limited Liability Company; **TMK/Hogan**, a Joint Venture; **Bricktown TMK/Hogan Entertainment, L.L.C.**, an Oklahoma Limited Liability Company; **Hogan Property Management, L.L.C.**, an Oklahoma Limited Liability Company; **Torchmark Corporation** ("TMK"), an Alabama Corporation; **Torchmark Development Corporation** ("TDC") and **TMK Income Properties, L.P.** ("TIP") both subsidiaries of TMK; **Dan Randolph ("Randy") Hogan**; **Edwards Theatres Circuit, Inc.**, a California corporation; **Oklahoma Gas & Electric Company** ("OG&E"), an Oklahoma corporation; **The Benham Group**, an Oklahoma Corporation.

## TABLE OF CONTENTS

PETITION FOR A WRIT OF CERTIORARI ..... 1

OPINIONS BELOW ..... 3

JURISDICTION ..... 3

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 5

United States Constitution, XIV Amendment, Section 1, Due Process ..... 5

Federal Rules of Civil Procedure ..... 5

Oklahoma Qui Tam Statutes ..... 5

Oklahoma Intervention Statute ..... 5

STATEMENT OF THE CASE ..... 5

REASONS FOR GRANTING CERTIORARI ..... 13

Purpose and Use of Qui Tam Laws ..... 15

Due Process and Res Judicata ..... 16

Intervention ..... 18

A Finding of Adequate Representation for Intervention is Not Constitutionally Sufficient to Protect a Party's Rights for Purposes of *Hansberry v. Lee*. ..... 18

An Analysis of the Right to Due Process and its Possible Violation by the Application of the Law Invoked in the Present Case Requires that This Court Grant Review of the Oklahoma Supreme Court's Decision ..... 20

CONCLUSION ..... 22

## TABLE OF AUTHORITIES

### FEDERAL CASES

Albertson's, Inc. v. Amalgamated Sugar Co., 503 F.2d 459 (10th Cir. 1974) ..... 17

Allen v. McCurry, 449 U.S. 90 (1980) ..... 16

Black v. Cutter Labs., 350 U.S. 816 (1956) ..... 4

Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation, 402 U.S. 313 (1971) ..... 16

Chapman v. Goodnow's Adm'r., 123 U.S. 540, 8 S.Ct. 211 (1887) ..... 4

Consumers Union v. Consumer Product Safety Comm'n, 590 F.2d 1209 (C.A. 1980) reversed on other grounds, 100 S.Ct. 1194, 445 U.S. 375 (1980) ..... 17

Hansberry v. Lee, 311 U.S. 31 (1940) ..... 1, 2, 16,19

Hobson v. Hansen, 44 F.R.D. 18 (D.C.D.C. 1968) ..... 19

Martin v. Wilks, 490 U.S. 755 (1989) ..... 16

Pennsylvania v. Rizzo, 530 F.2d 501 (3rd Cir. 1976) .... 18

Richards v. Jefferson County Alabama, 517 U.S. 793 (1996) ..... 1, 13

Street v. New York, 394 U.S. 576 (1969) ..... 4

Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 78 S.Ct. 1209 (1958) ..... 17

Western Life Indemnity Co. v. Rupp, 235 U.S. 261 (1914) 2

Woolen v. Surtran Taxicabs, 684 F.2d 324 (5th Cir. 1982) ..... 19, 20

STATE CASES

Brown v. City of Warr Acres, 946 P.2d 1140 (Okla. 1997) ..... 15

City of Oklahoma City v. Oklahoma City Urban Renewal Authority, 988 P.2d 901 (Okla. 1999) ..... 3, 8

Erwin v. Frazier, 786 P.2d 61(Okla.1989) ..... 16

Llewellyn v. Beasley, 415 N.E.2d 789 (Ind.App. 1981) .. 20

State ex rel. Tal v. Norick, 991 P.2d 999 (Okla. 1999) ... 10

State ex rel. Trimble v. City of Moore, 818 P.2d 889 (Okla. 1991) ..... 15

State of Oklahoma ex rel. Tal v. City of Oklahoma City et al., 19 P.3d 268 (Okla. 2000) ..... 2

Taxpayers League of Wayne County v. Wightman, 28 N.W. 2d 575 (Neb. 1947) ..... 16

Temeron, Inc. v. Ferraro Energy Corp., 861 P.2d 319 (Okla.App. Div. 3 1993) ..... 16

Williams v. Wilmington, 171 N.E.2d 757(Ohio 1960) ... 15

FEDERAL STATUTES

28 U.S.C. § 1257 ..... 3

Fed.R.Civ.P. 24(a)(2) ..... 14, 18, 19

U.S.C.A. Const. Amend. XIV ..... 5

STATE STATUTES

12 Okla.Stat. § 2011 ..... 11

12 Okla.Stat. § 2024 ..... 18

12 Okla.Stat. § 2024(a)(2) ..... 5

62 Okla.Stat. § 372 ..... 5, 6, 15

62 Okla.Stat. § 373 ..... 5, 6, 14, 15

OTHER AUTHORITIES

74 Am. Jur.2d Taxpayers' Actions § 47 ..... 18

74 Am. Jur. 2d Taxpayers' Actions § 62 ..... 17

Whistleblower Provisions of the Federal False Claims Act, 71 Temp. L. Rev. 23 (Spring 1998) ..... 15

18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981) ..... 16

*Mitchell v Nogales,* 83 Ariz 328, 320 P.2d 955; *Yale University v New Haven,* 160 A.2d 493; *State Bank of Outlook v Sheridan County,* 230 P. 1097

## PETITION FOR A WRIT OF CERTIORARI

Petitioners, Moshe Tal, and Taxpayers Against Ripoffs, a group of ten or more taxpayers in Oklahoma City, Oklahoma, ("Taxpayers" "Petitioners") respectfully pray that a writ of certiorari be issued to review the judgment of the Supreme Court of Oklahoma in this case. The Oklahoma Supreme Court has upheld an extreme application of res judicata which directly violates the Petitioners' right to due process under the Fourteenth Amendment to the United States Constitution.

In plain contravention of the requirements of the Constitution of the United States and this Court's decision in *Hansberry v. Lee*, 311 U.S. 31 (1940), the Oklahoma Supreme Court has embarked on an exercise of judicial power which blocks taxpayers access to the courts and deprives them of their right to be heard. This judicial blockade not only denies taxpayers access to the courts in qui tam actions, it also has far reaching implications for denial of due process to any non-party class member in derivative or class actions.

Under the mandate of *Hansberry* a judgment in a class action or any other type of representative action is not res judicata as to those class members who have a conflict of interest with the class representative. *Richards v. Jefferson County Alabama*, 517 U.S. 793, 801 (1996). Where such conflict of interest exists, the representation is inadequate as a matter of law and it is a violation of due process to hold the judgment res judicata as to those non-parties. When a state's highest court rules in a manner which so deprives its citizens of due process this Court has declared that it is the duty of this Court to review the lower court's decision and correct the violations of due process. *Hansberry v. Lee*, 311 U.S. at 40. The traditional rule holds that an extreme application of state law res judicata violates the federal constitution. *Richards v. Jefferson County Alabama*, 517 U.S. at 804. As stated in *Hansberry*:

> The State courts are free to attach such

> descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes.

*Hansberry v. Lee*, 311 U.S. at 40 (citing *Western Life Indemnity Co. v. Rupp*, 235 U.S. 261, 273 (1914)(emphasis added).

The lower court's decision involves an issue of the utmost federal importance. The decision below significantly weakens the protection of citizens' due process rights under the Fourteenth Amendment, as pronounced by this Court sixty years ago in *Hansberry v. Lee*. While this Court has heard and ruled upon other issues involving the extreme application of state res judicata, the question presented in this case has not been heard nor resolved. However, it is an issue that requires this Court's attention to inform taxpayers of the scope of their rights under *Hansberry*.

## OPINIONS BELOW

The Opinion of the Oklahoma Supreme Court is reported at *State of Oklahoma ex rel. Tal v. City of Oklahoma City et al.*, 19 P.3d 268 (Okla. 2000) ("*Tal III*") Appendix pp. 1-13. The Oklahoma Supreme Court's order denying rehearing is not reported and is found in the Appendix at pp. 41-43. The Oklahoma County, Oklahoma, District Court order denying

intervention is not reported. The District Court order is included in the Appendix at pp. 39-40.

## JURISDICTION

The Decision of the Supreme Court of Oklahoma was entered on September 26, 2000. *Tal III,* Appendix pp. 1-13. The Order denying the Taxpayers' Motion for Rehearing was entered on February 5, 2001. (Order, Appendix pp. 41-43). The decision in the State's highest court affirmed the dismissal of the Petitioners' action on the grounds that the res judicata effect of *City of Oklahoma City v. Oklahoma City Urban Renewal Authority,* 988 P.2d 901 (Okla. 1999)*("Tal I")* precluded them from establishing standing to bring the qui tam. *Tal III,* § 2, Appendix p. 7 and § 6, Appendix p. 9. The judgment below is therefore final for purposes of this Court's jurisdiction under 28 U.S.C. § 1257.

The petitioners expressly asserted below in their Brief in Opposition to Defendants' Motions to Dismiss[1] and on Appeal

---

[1] The trial court found this action to be barred by res judicata and dismissed it based on the Motions to Dismiss filed by: **The City Defendants**: The City of Oklahoma City Ronald J. Norick, Kirk D. Humphreys, James E. Thompson; William O. West, Daniel T. Brummitt; **The Urban Renewal Defendants**: The Oklahoma City Urban Renewal Authority; Tiana P. Douglas, Stanton L. Young, Fred Jones Hall, J. Larry Nichols, Warren Gardner, and James R. Tolbert III, William ("Bill") O. Johnstone Dan Batchelor, and **The Hogan Defendants**: Bricktown Parking Investors, L.L.C.,; Bricktown-TMK/Hogan Parking, L.L.C.; OKC Athletic Club Limited Partnership, TMK/Hogan, Bricktown TMK/Hogan Entertainment, L.L.C., Hogan Property Management, L.L.C., and TMK Income Properties, L.P. Dan Randolph ("Randy") Hogan. At the request of the Taxpayers and through cooperation of all parties, the trial court Journal Entry dismissed the action as to all defendants based on the belief

to the Oklahoma Supreme Court, that the barring of this action on the grounds of res judicata was a violation of their right to due process under the 14th Amendment to the United States Constitution. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, Record Document No. ("R.Doc. No.") R. Doc. No. 9; Petition in Error filed in Appeal No. 92874, Exhibit C, Appendix pp. 51-52. Despite the issue having been raised, both the trial court and the Oklahoma Supreme Court failed to address the constitutional question. However, the lower court's failure to address the denial of due process does not present a barrier to this Court's review of the issue.

"The issue of whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts." *Street v. New York*, 394 U.S. 576, 583 (1969); *See also Black v. Cutter Labs.*,351 U.S. 292, 298 (1956) (this Court has a "duty to . . .determine for ourselves precisely the ground on which the judgment rests"). Accordingly, a state court cannot evade this Court's review by failing to discuss federal questions in its opinion. *Chapman v. Goodnow's Adm'r.*, 123 U.S. 540, 548 (1887) ("If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects a claim, but avoids all reference to it, is as much against the right . . . as if it has been specifically referred to and the right directly refused.").

---

that because the City was a necessary party to a qui tam action, once the City was dismissed, the action had to be dismissed as to all remaining defendants.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### United States Constitution, XIV Amendment, Section 1, Due Process

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S.C.A. Const. Amend. XIV.

### Federal Rule of Civil Procedure

Federal Rule of Civil Procedure 24. Appendix pp. 47-48.

### Oklahoma Qui Tam Statutes

62 Okla.Stat. § 372. Appendix at pp. 44.

62 Okla.Stat. § 373. Appendix at p. 44-45.

### Oklahoma Intervention Statute

12 Okla.Stat. § 2024(a)(2). Appendix at p. 45-46.

## STATEMENT OF THE CASE

On March 15, 2000, the Taxpayers, ex rel the State of Oklahoma, filed a qui tam action against the City of Oklahoma City and twenty-nine other individual and corporate defendants. Petition, R. Doc. No. 1. Many of the defendants were either current or former officials or employees of the City of Oklahoma City. Other defendants were individuals and legal entities who were parties to or had knowledge of and benefitted from the contracts at issue which were entered into by the Oklahoma City Urban Renewal Authority acting as the

agent for the City of Oklahoma City. Petition, R. Doc. No. 1. The Taxpayers sought recovery of illegal transfers of public funds and property. *Id.*

The action was brought pursuant to the provisions of 62 Okla.Stat. § 373 which provides that following a written demand made pursuant to 62 Okla.Stat. § 372, a taxpayer may bring an action on behalf of the governmental entity after the proper governmental officers refused, failed or neglected to institute or diligently prosecute proper proceedings at law or in equity for the recovery of any money or property belonging to the state. 62 Okla.Stat. § 373. Petition, R. Doc. No. 1.

Prior to filing the qui tam petition the Taxpayers served the City with a written demand asking that the proper City official take the actions necessary to recover the public funds and property that had been transferred pursuant to the illegal contracts. Exhibit "A" to Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, Rec. Doc. No. 9. The written demand contained approximately 60 allegations of wrongdoing.

Two weeks after the City received the written demand the City filed a declaratory judgment action against its agent, the Oklahoma City Renewal Authority and the other parties to the disputed contracts. Declaratory Judgment Petition, Exhibit "F" to Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, Rec. Doc. No. 9. The petition asked that the Court judicially confirm the validity of the contracts, or in the alternative, declare the agreements invalid as a wrongful transfer of property rendering the contracts and transfers null and void and permitting the City to recover any and all property and other monies wrongfully transferred. Declaratory Judgment Petition, Exhibit "F" to Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, Rec. Doc. No. 9.

Despite the written demand's 60 plus allegations of wrongdoing, including fraud and severe conflicts of interest involving the City and Urban Renewal Officials responsible for

making the contracts, the City brought the declaratory judgment to litigate only one claim, that the contracts and related transfers were given for inadequate consideration and provided constitutionally inadequate protections for the City. The City's Petition did not contain any mention of the claims relating to conflicts of interest, fraud or other allegations that would invalidate the contracts. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9, and Declaratory Judgment Petition attached thereto as Exhibit "F".

After receiving the written demand, the City never contacted the taxpayers about the allegations made in the written demand. The City did not perform any discovery or other investigation into the facts surrounding the allegations in the written demand. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9. The only discovery in the matter was performed by the "non-government" defendants. The non-government defendant's discovery consisted of taking the depositions of the Taxpayers. Except for the taxpayer group leader, Moshe Tal, the members of the taxpayer group had no personal knowledge of the facts and evidence supporting the allegations. All of the information the Taxpayers possessed in deciding to sign the written demand was given to them by Mr. Tal. Mr. Tal and his partner, Baltimore, Maryland Urban Redeveloper, David Cordish, had competed with the non-government defendants on the bids for the contracts with the City and Urban Renewal. While Mr. Tal and Mr. Cordish were not ultimately chosen, it was during the bidding and selection process that, as a first hand observer, Mr. Tal witnessed the facts and conduct underlying the allegations in the written demand. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9. The City's attorneys did not cross-examine any of the Taxpayers.

Mr. Tal's deposition was 129 pages long. During his deposition Mr. Tal was asked mostly about the claim of inadequate consideration. He was also asked a few, very limited questions about the allegations of fraud and illegal

conflicts of interest contained in the written demand. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9. While Mr. Tal was able to give some information about the conflicts and fraud, he explained that he did not have the materials that he needed to help him answer some of the questions. Mr. Tal also explained that some of the allegations were based upon a reasonable belief and, to avoid speculation, he would need to conduct further investigation before he would feel free to expound further on the allegations. Tal's 2/22/99 Deposition, pp. 81-82 , *Tal I*, Appeal No. 92874.

One week after taking Mr. Tal's deposition, the City tried the declaratory judgment in a Bench Trial. The City did not give the Taxpayers any notice, formal or informal of the trial date. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9. While the Taxpayers acknowledge that they were not legally entitled to notice, they had expected to be notified since they had received copies of the City's Petition and the defendants' answers. However, on Thursday, February 25, 1999, the Taxpayers' attorney discovered, through independent sources, that the trial was scheduled for Monday, March 1, 1999. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9.

On Monday, March 1, 1999, the Taxpayers' attorney appeared at the declaratory judgment trial and moved for intervention of right and, in the alternative, permissive intervention, based on the Taxpayers' belief that the City would not adequately represent their interests.[2] (Trial Transcript, p.

---

[2] The Oklahoma Supreme Court mistakenly found that the Taxpayers' did not move for intervention of right. *See Tal I*, 988 P.2d at 905 § 15, Appendix pp. 26-27 ; District Court Order Denying Intervention of Right, Appendix pp. 39-40, Exhibit C, of Taxpayers' Petition in Error filed in the Oklahoma Supreme Court in *Tal I* showing the appeal of denial of intervention of right, Appendix pp. 55-56; Trial

31, Appendix p. 58; Motion to Intervene p. 1, Appendix p. 49). The trial court denied intervention on the grounds that the Taxpayers had not rebutted the presumption that the City was acting in good faith and would adequately represent the Taxpayers' interests. (Trial Transcript, p. 70, Appendix p. 58). Trial was thereafter held.

The City attorney charged with representing the City and the Taxpayers at trial was one of the attorneys who was intimately involved in the negotiations and drafting of the contracts the Taxpayers contended were illegal. Petition, R. Doc. No. 1. He made it clear in his opening statement, and throughout the trial, that he, the City, and the defendants all believed that the contracts were valid. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9 and Exhibit "L" attached thereto (excerpts from Declaratory Judgment Trial). The only "evidence" the City presented to "prove" the allegation that the contracts were invalid was the Taxpayers' depositions. The only witness the City called was the former MAPS Director/Manager (Assistant City Manager), who was also intimately involved in the negotiations and drafting of the contracts at issue. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9. He, of course, testified that he believed that the contracts were legal. The City did not cross-examine any of the defendants' witnesses, nor did the City present any evidence or testimony to rebut the evidence introduced by the defendants. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9.

At the close of the half day trial, the court held that the contracts were legal and supported by adequate consideration. Journal Entry of Judgment, Exhibit "A" to Taxpayers' Petition In Error, Appeal No. 92874.

The Taxpayers appealed the denial of intervention. The

---

Transcript p. 31, lines 18-36, Appendix p. 58.

Oklahoma Supreme Court affirmed the trial court's denial of intervention on the grounds that before a taxpayer can intervene in an action brought by the City on a written demand, the taxpayer must rebut the presumption that the City will act in good faith and adequately represent the taxpayers' interests. *Tal I,* 988 P.2d at 908 *§ 31*, Appendix p. 31.[3]

Following the decision in *Tal I*, the Taxpayers filed their qui tam petition in the case at bar (*"Tal III"*). Qui Tam Petition, R. Doc. No. 1. In their qui tam Petition, the Taxpayers brought all of the claims that were contained in the written demand, but were not litigated by the City in the declaratory judgment action. The Taxpayers further showed that because the City had, in fact, failed to adequately represent their interests, the judgment in the City's action in *Tal I* did not bar their bringing the qui tam after the City failed to diligently prosecute the action. Qui Tam Petition, R. Doc. No. 1.

The City, Urban Renewal and Hogan defendants filed Motions to Dismiss asserting that the judgment in *Tal I* was res judicata as to the Taxpayers and barred them from bringing the qui tam. R. Doc. No. 2–8 and 10-12. In their Brief in Opposition to the Defendants' Motions to Dismiss, the

---

[3] The Oklahoma Supreme Court made a similar finding in *State ex rel. Tal v. Norick*, 991 P.2d 999 (Okla. 1999)(*"Tal II"*). In *Tal II*, the Taxpayers had served a written demand and filed a qui tam (before the City filed and action) based on an entirely different set of facts and against different parties than those involved in *Tal I* and *Tal III*. Subsequently, the City brought a declaratory judgment action on the *Tal II* written demand and the trial court dismissed the Taxpayers' qui tam as premature. The court also explained that the Taxpayers' could not bring a qui tam, while the City's declaratory judgment action was pending, absent a showing that the City was acting in bad faith and would not adequately represent the Taxpayers' interests.

Taxpayers contended that under *Hansberry v. Lee* the judgment in the City's action did not bar the Taxpayers' action because the City had a conflict of interest with the Taxpayers and, thus, did not adequately represent them at trial. Taxpayers argued that it would violate due process to hold that the judgment in the City's declaratory judgment bound the Taxpayers under such circumstances. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9. The Taxpayers' also stated that they did not believe that the finding of adequacy of representation used to deny intervention barred the Taxpayers' from asserting post-trial that the City had, in fact, failed to adequately represent the Taxpayers' interest. Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss, R. Doc. No. 9.

The district court disagreed with the Taxpayers and dismissed the action on the grounds that the judgment in the declaratory judgment action barred the Taxpayers from bringing a qui tam. Journal Entry, Appendix pp. 14-16. The Taxpayers appealed to the Oklahoma Supreme Court on accelerated appeal and the decision in that Court was based on the briefs filed in the District Court. R. Doc. No. 1-14.

The Oklahoma Supreme Court affirmed the district court's dismissal of the qui tam on two grounds: 1) The decision in *Tal I,* denying intervention on the grounds that the City was adequately representing the Taxpayers' interests, was res judicata and prevented the Taxpayers from raising the issue of adequate representation to contest the res judicata effect of the City's judgment. 2) The judgment in the City's declaratory judgment action was res judicata to all issues that were or could have been brought in the declaratory judgment. *Tal III,* Appendix pp. 1-13. The court also relied on the decision in *Tal II* (involving the unrelated contracts) finding that it was precedent to show that the Taxpayers' could not intervene in the City's action or bring a qui tam during the pendency of the City's action, unless the Taxpayers proved that the City was acting in bad faith and was failing to adequately represent their

interests.[4] *Id.*

The Taxpayers believe that the Oklahoma Supreme Court's decision denied their right of due process under the

---

[4] The defendants filed Motions for Sanctions against the Taxpayers and their attorney under 12 Okla.Stat. § 2011 (the state version of Federal Rule of Civil Procedure 11). The defendants' alleged that sanctions were appropriate because the Taxpayers' action was barred by res judicata. They also alleged the action was filed for improper purposes. After hearing, the district court denied sanctions finding that the Taxpayers' action was objectively reasonable in light of the facts and law underlying Taxpayers' belief that the decision in *Tal I* was not res judicata to bringing the qui tam. The judge also denied Rule 2011 sanctions on the grounds of bad faith and improper purpose. The Hogan Defendants appealed that ruling which is currently pending in Oklahoma Supreme Court Appeal No. 95271. Then in the appeal of *Tal III*, The City, Urban Renewal and Hogan Defendants filed Motions for Appellate Attorney's Fees and Sanctions in the Oklahoma Supreme Court alleging the Taxpayers' appeal of the dismissal was frivolous. The motions for appellate sanctions were also denied. However, the same defendants had also filed motions for attorneys' fees in the trial court and the trial court granted those motions and ordered that the Taxpayers pay defendants' $185,000 in attorney fees. This award was based upon Oklahoma case law allowing an award of attorney's fees based on a subjective finding that an opposing party was acting in bad faith. The finding of bad faith was based upon the defendants' assertion that Mr. Tal had instigated the filing of the written demands in *Tal I* and *Tal II* and the Qui Tam Petition in *Tal III* as retaliation for the City not selecting him as the developer on the contracts being disputed in *Tal I* and *Tal III*. The Taxpayers have appealed the ruling which is currently pending in Oklahoma Supreme Court Appeal No. 95741.

Fourteenth Amendment of the United States Constitution and this Court's decision in *Hansberry v. Lee* and Taxpayers have thus petitioned this Honorable Court for Certiorari.

## REASONS FOR GRANTING CERTIORARI

The state court's extreme application of res judicata has decided an important issue that directly impacts federal constitutional rights in a manner that conflicts with this Court's decisions in *Hansberry v. Lee* and progeny holding that res judicata arising out of a representative action cannot bind a non-party where the non-party's interests were not adequately represented.

The state court applied this unconstitutional example of res judicata under circumstances that have not been, but should be, settled by this Court.

The state court has held that when taxpayers seek to intervene in an action brought by a governmental entity, a decision denying intervention of right on the grounds that the taxpayers' rights are adequately represented, is res judicata and bars the taxpayer from making a post-trial *Hansberry v. Lee* challenge to the adequacy of representation for the purpose showing that the taxpayers had, in fact, been inadequately represented and they are not bound by the judgment. The right to make a post-trial showing of inadequate representation is expressly granted in *Hansberry v. Lee*. This Court held in *Hansberry*, if a member of a class in a representative action is able to prove post-trial that the class representative inadequately represented the class members' rights, that class member will not be bound by the judgment in the representative action.[5]

---

[5] In *Richards v. Jefferson County, Alabama*, this Court held that in taxpayer actions based on public interests, ". . . we may assume that the States have wide latitude to establish procedures not only to limit the number of judicial

The law holding that a non-party will not be bound by a judgment in a representative action if the non-party's interests were not adequately represented is well settled under *Hansberry v. Lee.* Thus, the Taxpayers will not ask this Court to revisit that issue. However, there is no similar authority from this Court governing the issue of whether due process is violated where a non-party is held to be barred from making a *Hansberry v. Lee* challenge to a judgment when:

1) a non-party taxpayer seeks to intervene as a matter of right under FRCP 24(A), or similar state statute, in an action brought by a governmental entity, and,

2) intervention is denied based on the taxpayer's failure to rebut the presumption that the government is acting in good faith and will adequately represent the taxpayers interests, and

3) following judgment in the government's action, the decision denying intervention is held as res judicata against the

---

proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all." *Richards,* 517 U.S. at 803. However, without this Court's further elucidation on the parameters of that statement, the Taxpayers believe that the unconstitutional limits imposed in this case are not within the scope of the rule or preclusion enunciated in *Richards.* The Oklahoma qui tam statutes have given the taxpayers standing to bring an action when the government refuses, neglects or fails to bring or diligently prosecute the claims contained in the taxpayers' written demand. 62 Okla.Stat. § 373. The phrase "diligently prosecute" shows the legislature's intent to allow a taxpayer action in situations where the government has already brought an action. With this grant of standing, both in the absence of the government bringing an action and when the government brings an action and fails in its duty, it is improper for a court to deny the taxpayers' right through the use of res judicata.

taxpayer on the question of adequate representation and the taxpayer is therefore barred from challenging the res judicata effect of the judgment as permitted under *Hansberry v. Lee*.

To properly understand the interconnection of rights and issues that call for this Court's decision to protect non-party due process rights, it is first necessary to have a general understanding of the law, rights and interests underlying qui tam suits, the rules and standards for intervention and the due process requirements of *Hansberry v. Lee*.

**Purpose and Use of Qui Tam Laws**

Qui tam laws are enacted to enable citizens to assist the government in discovering and prosecuting fraud against the government. In passing qui tam provisions, Congress intended to commission "private attorneys general" to assist the government in ferreting out fraud. Marc S. Raspanti and David M. Laigaie, Current Practice and Procedure under the Whistleblower Provisions of the Federal False Claims Act, 71 Temp. L. Rev. 23 (Spring 1998).

In Oklahoma, resident taxpayers of a city may, in the name of the State of Oklahoma as plaintiff, bring a qui tam action under 62 Okla.Stat. §§ 372, 373 to recover city money or property that was paid or transferred illegally or without authority. Before bringing a qui tam, the taxpayers must first serve a written demand upon the city asking that the appropriate officials institute proper proceedings to recover the money and property wrongfully transferred. If the city officials refuse, fail or neglect to institute or diligently prosecute proper proceedings at law or in equity to recover any money belonging to the city, then the taxpayers may bring a qui tam to enforce the city's right. *State ex rel. Trimble v. City of Moore*, 818 P.2d 889, 894 (Okla. 1991); *see also, Brown v. City of Warr Acres*, 946 P.2d 1140, 1149 (Okla. 1997).

The failure of a City solicitor to use reasonable diligence in prosecuting a suit instituted by the City upon the written demand of a taxpayer constitutes a failure to comply with the

written demand. *Id.*; *Williams v. Wilmington*, 171 N.E.2d 757, 762-63(Ohio 1960); 74 Am. Jur.2d Taxpayers' Actions § 31 (fn 80). Where a City shows its intent to dispute or contest the allegations made in the Taxpayers' written demand, it can be presumed that the City has refused to pursue the Taxpayers demand. *Taxpayers League of Wayne County v. Wightman*, 28 N.W. 2d 575 (Neb. 1947).

**Due Process and Res Judicata**

Res judicata, or claim preclusion, bars relitigation by the parties or their privies of issues which were or could have been litigated in an action which resulted in a final judgment on the merits. *Allen v. McCurry*, 101 S.Ct. 411, 415,(1980); *Temeron, Inc. v. Ferraro Energy Corp.*, 861 P.2d 319, 323 (Okla.App. Div. 3 1993) (*citing Erwin v. Frazier*, 786 P.2d 61, 64 (Okla.1989). When applying the doctrine of res judicata it is important to remember that in our system of law, there is a 'deep-rooted historic tradition that everyone should have his own day in court.' 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981); *Martin v. Wilks*, 490 U.S. 755, 761-762 (1989).

Generally, one is not bound by a judgment in litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Hansberry v. Lee*, 311 U.S. at 40. "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks, 490 U.S. 755, 762 (1989)*; *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329 (1971).

In certain limited circumstances, when a person, who is not a party, has his interests adequately represented by someone with the same interests who is a party, the non-party may be bound by the judgment in that action. *See Hansberry v. Lee*, 311 U.S. at 41-42 (class or representative suits); 74 Am.Jur2d *Taxpayer Actions* § 62 (the rules governing res judicata in other representative actions applies equally to

actions instituted by or on behalf of taxpayers). The likelihood of a non-party being bound increases when the representative party is a governmental entity. 74 Am. Jur. 2d *Taxpayer Actions* § 62. In the absence of fraud or collusion, a judgment for or against a governmental body in an action brought by the governmental body on behalf of the public as a general rule is binding and conclusive on all residents, citizens, and taxpayers with respect to matters adjudicated which are of general and public interest. *Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958).

However, in *Hansberry v. Lee* this Court held that it is a violation of due process to bind a non-party to a judgment in a representative action where the parties to the action did not adequately represent the non-party's interest. This Court further held that representation is inadequate as a matter of law where the putative representative has interests that conflict with the interests of the class. It is axiomatic that a representative plaintiff cannot maintain a class action when his interests are antagonistic to, or in conflict with, the interest of the persons he would seek to represent. *Albertson's, Inc. v. Amalgamated Sugar Co.*, 503 F.2d 459, 463 (10th Cir. 1974)(*citing, inter alia, Hansberry v. Lee*, 311 U.S. 32). The requirement of adequate representation must be stringently applied because members of the class will be bound by the decision of the court. *Id.*

A taxpayer's due process rights are also protected by the rule of *Hansberry v. Lee.* When the government brings an action on the written demand, the judgment in that action will not preclude a derivative action by the citizens, where there is evidence of a conflict between the self-interest of the government officials and the interest of the citizens. *Consumers Union v. Consumer Product Safety Comm'n*, 590 F.2d 1209, 1217-1218 (C.A. 1980) *reversed on other grounds*, 445 U.S. 375 (1980).

**Intervention**

The right to intervene is granted by statute which provides that upon timely application anyone shall be permitted to intervene in an action "[w]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest." 12 Okla.Stat. § 2024 (a)(2); Fed.R.Civ.P. 24(a)(2).

Courts have held that under state statutes and rules similar to Federal Rule 24(a)(2), a taxpayer is entitled to intervene in an action brought by or against a public body or public officials on a matter affecting the rights of taxpayers generally, if it appears that the conduct of the case by the public body or public officials is inadequate to protect the taxpayers' rights. 74 Am. Jur.2d Taxpayers' Actions, § 47.

But ordinarily, a municipality or public body, through its officers, represents the taxpayers in litigation relating to municipal or public affairs, so that a taxpayer usually has no standing to seek intervention in such litigation in which the municipality is a party. The representation by the proper officers is presumed adequate to protect the interests of the citizens and taxpayers, in the absence of gross negligence, collusion, or bad faith on the part of such officers. *Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3rd Cir. 1976).

**A Finding of Adequate Representation for Intervention is Not Constitutionally Sufficient to Protect a Party's Rights for Purposes of *Hansberry v. Lee*.**

A finding of adequate representation for purposes of intervention does not comply with the due process requirements of *Hansberry v. Lee*. When adequacy of representation is considered for intervention, the court does not have to concern itself with whether the judgment will be binding on the failed intervener. Rather, when determining

the adequacy of representation for intervention, the court assumes that if intervention is denied, the intervener will not be bound by the judgment in the action if, in fact, the representation was inadequate. *Woolen v. Surtran Taxicabs*, 684 F.2d 324 (5th Cir. 1982); *Hobson v. Hansen*, 44 F.R.D. 18, 24, 26 (D.C.D.C. 1968)(holding that when a party is denied intervention of right, he will not be bound by the judgment if the representation is, in fact, inadequate).

The non-preclusive effect of a finding of "adequate representation" for purposes of intervention is discussed in the Advisory Committee's note to the 1966 amendment to Rule 24(a)(2). Prior to amendment, the language in Rule 24(a)(2) required that an applicant could not intervene of right, unless he showed that he was inadequately represented and that he would be "bound" by the judgment in which he sought to intervene. However, the two requirements created an oxymoron since, under *Hansberry v. Lee*, the failed intervener would not be bound by the judgment if, in fact, his rights were not adequately represented. The Committee, citing *Hansberry v. Lee*, 311 U.S. 32 found that a class member who was denied intervention and against whom a judgment in a class action is asserted as res judicata, would be entitled to show in a later action that he had not, in fact, been adequately represented and he was therefore, not bound. Advisory Committee Note, 1966 Amendment Fed.R.Civ.P. 24(a)(2).

The adequacy of representation for purposes of intervention does not preclude a claim of inadequate representation under *Hansberry* because "adequacy of representation" is different in the two situations. Adequate representation in the intervention context is not the constitutional equivalent of a finding of adequate representation for res judicata.

In *Woolen v. Surtran Taxicabs*, 684 F.2d 324, the Fifth Circuit held that the notion of adequate representation sufficient to satisfy the due process requirements for a class action is not the equivalent of adequate representation for

purposes of intervention of right. The court found that it was "apparent that the notion of adequacy for purposes of Rule 23(a)(4) (class certification) is one having more concern with the res judicata effects of a judgment on absent members of a class." *Woolen v. Surtran Taxicabs*, 684 F.2d at 332. The adequacy of representation in a class action is "that essential to due process under *Hansberry v. Lee* before absent class members can be bound." *Woolen v. Surtran Taxicabs*, 684 F.2d at 332. On the other hand, adequate representation for purposes of intervention of right is not concerned with res judicata or due process. *Woolen v. Surtran Taxicabs*, 684 F.2d 331, 332; *see also Llewellyn v. Beasley*, 415 N.E.2d 789, 793 (Ind.App. 1981)(holding that the interest necessary for intervention is not equivalent to the interest necessary for standing to bring an action).

**An Analysis of the Right to Due Process and its Possible Violation by the Application of the Law Invoked in the Present Case Requires that This Court Grant Review of the Oklahoma Supreme Court's Decision**

The Committee Notes and the Fifth Circuit in *Woolen* both recognize that a holding of adequate representation for intervention does not preclude a party from collaterally attacking the judgment when it is asserted as res judicata against him, where the party was, in fact, inadequately represented.

This result is justified because the standard for evaluating adequacy of representation for purposes of intervention is not equivalent to the standard of due process demanded by *Hansberry v. Lee*. In fact, the standards are even less alike in an action brought by the government, wherein a taxpayer seeks to intervene. When seeking to intervene in a government action, a taxpayer has to rebut the presumption of good faith and adequate representation. To prove inadequate

representation under *Hansberry v. Lee*, the taxpayer is not met with such a high burden. Rather, to avoid the res judicata effect of a judgment under *Hansberry* the non-party is merely required to show that there is a conflict of interest between the representative party and the non-party or show that he was actually, inadequately represented.

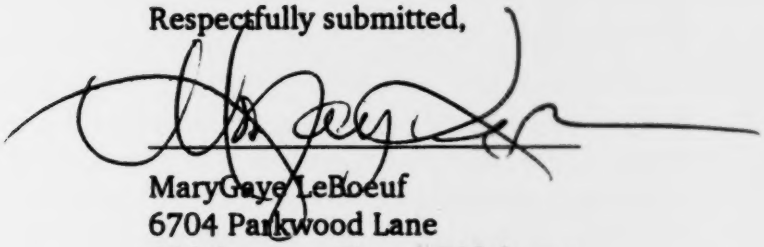
Thus, it is critical for this Court to grant certiorari and inform taxpayers of the precise dimensions of their due process rights where they are inadequately represented. In attempting to protect their rights, taxpayers must know whether their attempts to intervene in an action brought by the government might bar them from bringing a qui tam following judgment in the government's action even though the taxpayer's rights were, in fact, inadequately represented. Accordingly, this Court must pronounce that anything less than the due process analysis required under *Hansberry v. Lee* will not bar the taxpayers from bringing a qui tam following a judgment in an action brought by the government on the same claims. Similarly, if this Court finds that there is a lesser standard of due process for taxpayers bringing a qui tam action, it is this Court's duty to announce that rule and define its parameters so that the taxpayers will know their rights and be better able to protect those rights.

Taxpayers' right to be heard and present evidence must be protected.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



MaryGaye LeBoeuf
6704 Parkwood Lane
Oklahoma City, Oklahoma
73132
Telephone: (405)728-9925

Counsel for Petitioners